

**WHALEN & TUSA, P.C.**

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December 6, 2010

**BY ECF FILING AND OVERNIGHT MAIL**

Honorable Arthur D. Spatt  
United States District Court  
For the Eastern District of New York  
P.O. Box 9014  
Central Islip, NY 11722-9014

Re: Gunther v. Capital One, N.A., Civil Action No. 09-2966-ADS-AKT

Dear Judge Spatt:

We are counsel for Plaintiff and certified Class Counsel and write in response to a letter you may have received from Paul Whalen, dated December 3, 2010, attempting to address a matter concerning Class Counsel's fee application in the above-referenced action. Initially it should be noted that Mr. Whalen's letter contains numerous inaccurate statements. Mr. Whalen is neither Class Counsel nor has he litigated in this class action for Plaintiff or the settlement class.

Nevertheless, Mr. Whalen's letter is premature insofar as it concerns Class Counsel's fee application that has yet been adjudicated by this Court. Mr. Whalen's letter is further unripe for Court consideration until after the apportionment of such fee among Class and Plaintiff's counsel, which apportionment will not be considered by Class Counsel until after this Court enters a fee award. The [proposed] Final Order and Judgment submitted and endorsed by all parties addresses Mr. Whalen's concerns insofar as it vests this Court with ancillary and continuing jurisdiction to address any apportionment dispute that may (or may not) arise in the future. The law of this Circuit confirms that such disputes must await until after a fee has been awarded and apportioned. *See Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82 (2d Cir. 2010) (fee dispute among class and plaintiffs' counsel addressed after fee apportioned; "The District Court also directed lead counsel to allocate fees to C&T, subject to later review by the court.") (emphasis added).

Respectfully yours,  
/s/  
Joseph S. Tusa

cc: Counsel of Record (By ECF Filing)

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